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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-52

ROBERT Z. NAIFEH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JAMES P. LINN, *Esq.*
and
B. J. ROTHBAUM, JR., *Esq.*
LINN, HELMS, KIRK & BURKETT
Suite 410, Fidelity Plaza
Oklahoma City, Oklahoma 73102
Attorneys for Petitioner
ROBERT Z. NAIFEH

July, 1979

UTTERBACK TYPESETTING CO., INC. OKLAHOMA CITY, PH. 235-0030

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INTRODUCTION

Petitioner, Robert Z. Naifeh, respectfully prays that this Court review the jurisdictional dismissal entered by the Court of Appeals for the Tenth Circuit, dismissing Mr. Naifeh's appeal from an order of the District Court for the Western District of Oklahoma which denied his motion to dismiss an indictment charging a violation of the Sherman Act. The ground for the motion to dismiss was that the indictment shows on its face it is barred by the Double Jeopardy Clause of the Fifth Amendment. The Court of Appeals ruled it had no jurisdiction to review the District Court's order denying Mr. Naifeh's motion to dismiss the indictment on double jeopardy grounds, holding that the principle announced in *Abney* v. *United States*, 431 U.S.

651 (1977), was inapplicable in this case because a jury had not yet been formally sworn and, thus, jeopardy had not formally "attached." This jurisdictional dismissal presents important questions concerning what one Court of Appeals has described as "the procedural consequences of the rule of *Abney*," *United States* v. *Inmon*, 568 F.2d 326, 329 (3rd Cir. 1977) (*cf.*, *Helstoski* v. *Meanor*, No. 78-546 (June 18, 1979), 47 U.S.L.W. 4708, 4710 n.4). The dismissal below has the potentional to transform the apparently clear rule announced in *Abney* into a jurisdictional quagmire; to create a serious conflict between the requirements for presenting pre-trial motions set forth in Rule 12, Federal Rules of Criminal Procedure and the jurisdictional time-bar of Rule 4(b) of the Federal Rules of Appellate Procedure for taking an appeal from a "final decision" of a District Court; and appears to place defense counsel in a position of tension between his duty to represent his client and his professional responsibility to the trial court.

Apparently agreeing that its holding raises a substantial question, the Court of Appeals took the distinctly nonroutine step of staying its mandate pending final disposition of the instant petition for certiorari by this Court (App. A, p. A-4). (See, Rule 16 of the Rules of the Court of Appeals for the Tenth Circuit regarding such stays.)

OPINION BELOW

The opinion of the Court of Appeals, the Court's order on rehearing, and the order of the District Court for the Western District of Oklahoma, appear as Appendix A hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1979. A timely petition for rehearing was granted to the extent of amending the form of the judgment, and otherwise denied, on June 15, 1979. The jurisdiction of this Court rests upon 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. The jurisdictional dismissal of Mr. Naifeh's appeal presents a question which comes to this: When the vice of double jeopardy inheres in the indictment itself, is an appeal from the denial of a motion to dismiss that indictment within the scope of the principle announced by this Court in *Abney* v. *United States*, 431 U.S. 651 (1977)? Put a slightly different way: was the Court of Appeals in error in holding that the double jeopardy question in this case could not be decided until (at least) petitioner had followed the highly disruptive course of re-urging the question after a jury had been empaneled and sworn in the District Court?

2. Does an indictment charging a conspiracy to violate the Sherman Act, 15 U.S.C. §1, naming as defendants both a family-owned partnership composed of two brothers, and one of the brothers individually, violate the Double Jeopardy Clause of the Fifth Amendment by impermissably doubling the quantum of punishment for an alleged Sherman Act violation which Congress has defined, *see*, *Sanabria* v. *United States*, 437 U.S. 54, 69-70 (1978), and by subjecting the defendant to "multiple punishments for the same offense", *North Carolina* v. *Pearce*, 395 U.S. 711,

717 (1969); *Jeffers* v. *United States*, 432 U.S. 137, 150-151 (1977)?

3. If so, does the action of the Government in seeking a severance of the family-owned partnership, and its immediate trial — while this appeal was pending in the Court of Appeals — constitute an election which bars the Government from now trying Mr. Naifeh?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND FEDERAL RULES OF PROCEDURE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> "Nor shall any person be subject for the same offense to be twice in jeopardy of life or limb; . . ."

28 U.S.C. §1291 provides in pertinent part:

> "The Courts of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States . . ."

Federal Rule of Criminal Procedure 12(b) and 12(f) provide in pertinent part:

> "Any defense . . . which is capable of determination without the trial of the general issue may be raised before trial on motion. . . . The following must be raised prior to trial: . . . (2) defenses or objections based on defects in the indictment . . .; . . . Failure by a party to raise defenses or objections or to make requests which must be made prior to trial . . . shall constitute waiver thereof, . . ."

Federal Rule of Appellate Procedure 4(b) provides in pertinent part:

> "In a criminal case the notice of appeal by a defendant shall be filed in the District Court within ten days after the entry of the judgment or order appealed from."

STATEMENT OF THE CASE

On December 7, 1978, an indictment charging a conspiracy to violate Section 1 of the Sherman Act, 15 U.S.C. §1, was returned by a grand jury empaneled within the Western District of Oklahoma against four defendants: Central Liquor Company, a two-brother partnership in which Robert Z. Naifeh is the principal partner, and Robert Z. Naifeh individually; Jarboe Sales Company, a small partnership in which Louis Abraham, Jr. is a partner, and Louis Abraham, Jr. individually.

The District Court required all pre-trial motions to be filed by December 27, 1978. On that date Mr. Naifeh filed a motion to dismiss the indictment as to him on double jeopardy grounds. The core of the dismissal motion was that the Government had brought an alter ego indictment by indicting both Central and Mr. Naifeh. Mr. Naifeh contended that such an indictment was vitiated by the Double Jeopardy Clause of the Fifth Amendment since the effect of the indictment was to indict Central because Central is Mr. Naifeh, and to indict Mr. Naifeh because he is Central. Under the general federal rule that a partnership is merely an aggregation of its members, see, *Weingarten* v. *Universal C.I.T. Credit Corporation*, 302 F.2d 1 (2d Cir. 1962), *Helvering* v. *Smith*, 90 F.2d 590, 591 (2d Cir. 1937) (L.

Hand, J.), it necessarily followed that the indictment was duplicitous and barred by the Double Jeopardy Clause because, in effect, Mr. Naifeh had been indicted twice for the same offense.

The District Court heard all pre-trial motions on January 4, 1979.

At that time, the District Court overruled Mr. Naifeh's motion to dismiss the indictment on double jeopardy grounds. The District Judge stated his opinion to be that Mr. Naifeh's motion seemed well taken. The District Judge observed that, as an original proposition, counsel for the defense would "have no difficulty . . . persuading me that we have double jeopardy here. . . ." (Tr. pp. 19-20). The District Judge stated that he, nevertheless, felt constrained to overrule the motion to dismiss in light of the prevailing opinion of a divided panel of the Court of Appeals in *Western Laundry & Linen Rental Co.* v. *United States*, 424 F.2d 441 (9th Cir. 1970), *cert. denied*, 400 U.S. 849. *Id.* The District Court noted, in its order overruling the motion to dismiss, that the ruling on the double jeopardy question was a final order and was immediately appealable to the Court of Appeals[1] (App. A, p. A-6).

At no time in the proceedings in the District Court did the Government question Judge Eubanks' ruling that, under this Court's decision in *Abney* v. *United States*,

[1] Indeed, Judge Luther B. Eubanks, the Judge who heard the defense motions in this case recessed the hearing in order to confer with another Judge of the Western District of Oklahoma, Judge Ralph G. Thompson, with regard to procedural matters relating to a double jeopardy appeal which had recently been before Judge Thompson and which was taken on immediate appeal to the Court of Appeals. See, *Martinez* v. *United States*, 562 F.2d 633 (10th Cir. 1977).

supra, his denial of the motion to dismiss on double jeopardy grounds was an immediately appealable final order.

Petitioner took a timely appeal to the Court of Appeals. The double jeopardy question was elaborately briefed on the merits.

In its brief on appeal, the Government, in addition to responding on the merits, suggested for the first time that there was a question as to the appealability of the District Court's order. The Government suggested that since the Double Jeopardy Clause claim appeared to be directed primarily to the question of multiple punishment for the same offense, rather than sequential trials, the appeal was not within the scope of the principle announced in *Abney*.

Petitioner vigorously disputed the Government's theory in his reply brief in the Court of Appeals, and it is, we believe, significant that the Court of Appeals did *not* accept the Government's suggested distinction. Rather, the Court, *sua sponte*, noted that this Court had held in *Serfass* v. *United States*, 420 U.S. 377 (1975) (in the context of a *government* appeal) that jeopardy did not "attach" at the pre-trial stage of a criminal proceeding so as to bar the Government's right to appeal. The Court believed that the *Serfass* requirement applied the subsequent holding in *Abney* with regard to defendant's appeals under 28 U.S.C. §1291. The Court agreed that the language of the *Abney* opinion did not place such a limitation upon petitioner's right to appeal. The Court held, nevertheless, that this limitation was implicit in the facts of *Abney*. The Court did not discuss the fact that *Serfass* presented the question of "attachment of jeopardy" in the opposite context than it is presented here. In *Serfass*, the question was whether jeop-

ardy had sufficiently "attached" so as to *prevent* an appeal *by the Government* under 18 U.S.C. §3731; in the instant case, the question is whether a *defendant* may appeal under 28 U.S.C. §1291 as interpreted in *Abney*.

The Court of Appeals, nevertheless, concluded that since Mr. Naifeh had not yet stood before the trier of fact, *Serfass* required that the appeal be dismissed as premature[2] (App. A, pp. A-2, A-3).

The Court of Appeals stayed its mandate pending final disposition of this petition for certiorari (App. A, p. A-4).

REASONS FOR GRANTING THE WRIT

1. The jurisdictional dismissal of Mr. Naifeh's motion to dismiss on double jeopardy grounds entered by the Court of Appeals presents an important question in the administration of federal criminal justice which will, doubtless, recur, absent an authoritative ruling from the Court as to: (a), the scope of the rule announced in *Abney* v. *United States*, 431 U.S. 651 (1977) and (b), the consequences of *Abney's* holding that an order of a District Court overruling a plea of double jeopardy is a final, and thus immediately appealable, decision within the scope of Rule 4(b), Federal Rules of Appellate Procedure. The dismissal below reminds once again that

> "[c]larity is to be desired in any statute, but in matters of jurisdiction it is especially important. Otherwise the courts and the parties must expend great energy, not on the merits of dispute settlement, but on simply deciding whether a court has the power to hear a case." *Serfass* v. *United States*, 420 U.S. 377, 384 (1975), *quoting*, *United States* v. *Sisson*, 399 U.S. 267, 307 (1970).

[2] The Court of Appeals' opinion of May 15, stated that the District Court's denial of the motion to dismiss the indictment was "affirmed." After petitioner, in his petition for rehearing, called attention to this language, the Court of Appeals amended the judgment to state that the appeal was "dismissed" (Order of June 15, 1979, App. A, p. A-4).

The jurisdictional dismissal entered below cannot be satisfactorily reconciled with the construction which the Court of Appeals for the Fifth Circuit has given to the principle announced in *Abney* in *United States* v. *Garcia*, 589 F.2d 249, 250-251 (5th Cir. 1979). There, the Fifth Circuit flatly stated that, even though it determined on the merits that sufficient jeopardy had not "attached" to bar the Government from proceeding to trial on a superseding indictment, "the [District] Court's order [overruling the motion to dismiss the indictment on double jeopardy grounds] is appealable." 589 F.2d at 250.

And, insofar as the dismissal below draws a constitutional distinction between sequential jeopardy and simultaneous jeopardy, it is substantially inconsistent with the holding of the Court of Appeals for the Ninth Circuit that there is "no basis for such a distinction." *Launius* v. *United States*, 575 F.2d 770, 771 (1978).

More fundamentally, the jurisdictional dismissal of the appeal entered by the Court of Appeals, when considered in conjunction with: (1) the requirements of Rule 12 of the Federal Rules of Criminal Procedure governing the presentation of defenses which can be determined "without the trial of the general issue", *see, United States* v. *Covington*, 395 U.S. 57, 60-61 (1969), and which may well be waived if not presented prior to trial, *see, United States*

v. *Perez*, 565 F.2d 1227, 1232 (2d Cir. 1977) (double jeopardy claim subject to waiver under Rule 12(f)); (2) the holding of this Court in *Abney* v. *United States*, that a decision of a District Court denying a motion to dismiss on double jeopardy grounds is a "final decision" within the meaning of 28 U.S.C. §1291 which is immediately appealable and (3) the "mandatory and jurisdictional", *United States* v. *Robinson*, 361 U.S. 220, 224, 229 (1960), requirement of Rule 4(b) of the Federal Rules of Appellate Procedure that in a criminal case a notice of appeal must be filed within ten days from the date of the judgment or order appealed from or be jurisdictionally time barred, *see, Helstoski* v. *Meanor, supra*, No. 78-546, 47 U.S.L.W. 4708, 4710 n.4, threatens to create an insoluble jurisdictional dilemma. The effect may well be to turn the guaranty of the Double Jeopardy Clause, and the principle of appellate review announced in *Abney*, into

> "a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

The court below has decided a major question under the Double Jeopardy Clause, and has, we firmly believe, decided it erroneously. That question, in essence, is whether the concept of "attachment of jeopardy" is the *sine qua non* for appellate jurisdiction under 28 U.S.C. §1291 as interpreted in *Abney* v. *United States, supra*, when a defendant is seeking to appeal from an order of the District Court denying his motion to dismiss. The Court of Appeals held that it is, apparently on the theory that since "attachment of jeopardy" is a crucial question in determining

whether the Government will be allowed to take an appeal under the Criminal Appeals Act, 18 U.S.C. §3731, it is an equally crucial question in deciding whether a defendant will be allowed to appeal from a motion to dismiss presenting a double jeopardy question under 28 U.S.C. §1291. The jurisdictional dismissal of the court below is, thus, based upon a holding that the concept of "attachment of jeopardy" is fungible. This is a fundamental error, an error caused, we believe, by overlooking the reminder of a great Justice that a principle of constitutional law "is not susceptible of comprehensive statement in an adjective." *Carter* v. *Carter Coal Co.*, 298 U.S. 238, 327 (1936) (Cardozo, J., dissenting). The disposition below presents an important question which has not been, but should be, reviewed, and corrected, by this Court.

The holding below is wrong both in principle and in practical effect. It requires a ritualistic, senseless waste of the energies of the defendant, the Government and the trial court, a ritual which benefits no one, not the defendant, not the Government and certainly not the District Court.

Indisputably, *Serfass* v. *United States, supra*, was correctly decided. But *Serfass* is simply irrelevant here.[3] Government appeals, as the Court has recently said, do

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[3] Indeed, even the Government did not suggest to the Court of Appeals that the *Serfass* rationale had any relevance here. The Court invoked *Serfass sua sponte*. The Government's theory — that petitioner should not be allowed to appeal the double jeopardy question here at all prior to verdict — is simply an attempt to limit the principle announced in *Abney* to the facts of that case. The Government's argument was essentially the same as its argument in *Abney*, that is, a double jeopardy plea, if good, can always be the basis for an appeal in the event of an unfavorable verdict and becomes moot in the event of a favorable verdict. *See, Abney* v. *United States*, No. 75-6521, O.T., 1975, Brief for the United States, pp. 39-47. The argument did not prevail in *Abney* and should not prevail here.

not have "anything whatsoever to do with a defendant's right to appeal the denial of a motion to dismiss the indictment . . ." *United States* v. *MacDonald*, 435 U.S. 850, 98 S.Ct. 1547, 1550 n.5 (1978). While the context of *MacDonald* was different from that herein, the basic premise — that the two issues are not interchangeable — is the same.

The important question posed in this case is the *opposite* of the question posed in *Serfass*. Here, the Court of Appeals, has held that formal "attachment of jeopardy", in the sense at least of formally swearing a jury, is a jurisdictional precondition which must be met before a defendant will be allowed to receive appellate consideration of his double jeopardy claim, even when the vice of double jeopardy is apparent on the face of the indictment. *Serfass* simply gives no support to this theory, nor does it cast any light upon the important Double Jeopardy Clause considerations which are at issue here. As The Chief Justice was careful to observe in his opinion in *Serfass*, that case dealt only with the use of the Double Jeopardy Clause as a bar to *prevent* an appeal by the Government under the Criminal Appeals Act. And The Chief Justice guarded the *Serfass* holding as well as language will allow, stating:

> "We hold *only* that the Double Jeopardy Clause does not bar an appeal *by the United States* under 18 U.S.C. §3731 with respect to a criminal defendant who has not been 'put to trial before the trier of the facts, whether the trier be a jury or a judge'." *Serfass* v. *United States*, 420 U.S. 377, 394 (1975) (emphasis added; citation omitted).

There is no indication in this precisely-worded holding that the Court in *Serfass* intended that decision to

function as a cleaver to carve an implied exception out of the subsequent holding two Terms later in *Abney*. The contrary view of the Court of Appeals cannot be reconciled with this Court's emphasis only last Term on the lack of any congruence between a government appeal under 18 U.S.C. §3731 and a defendant's appeal under 28 U.S.C. §1291. *United States* v. *MacDonald, supra*, 435 U.S. 850, 98 S.Ct. 1547, 1550 n.5 (1978). *Compare, Helstoski* v *Meanor*, No. 78-546, 47 U.S.L.W. 4708, 4709-4710 (June 18, 1979) (28 US.C. §1291) *with, United States* v. *Helstoski*, No. 78-349, 47 U.S.L.W. 4710, 4712 and n.6 (June 18, 1979) (18 U.S.C. §3731).

Abney itself certainly appears to have been written with a view to avoiding exactly the sort of fact-specific focus on each particular appeal under the Double Jeopardy Clause which the decision below would require. *Abney* has been so understood by scholarly commentators on federal jurisdiction. *See*, 15 Wright and Miller, *Federal Practice and Procedure*, §3918 (1978 Supp.):

> "The *Abney* decision is written in terms that appear to cover *all* motions to dismiss on double jeopardy grounds . . . [because] immediate appeal provides the only effective protection of the important purpose of the double jeopardy guaranty to insulate not only against conviction, but also against the personal strain, public embarrassment and expense of an *improper* criminal trial." (emphasis added).

An improper criminal trial is precisely what petitioner herein seeks to prevent. *See also, Helstoski* v. *Meanor, supra*, No. 78-546, 47 U.S.L.W. 4708, 4709 and n.4 (June 18, 1979). As the decision in *Helstoski* vividly demonstrates,

"clarity in matters of jurisdiction" is vital. Confusion on a jurisdictional issue can readily result, as it did in *Helstoski*, in denial of *any* appellate review of important constitutional claims.

The jurisdictional dismissal entered by the Court of Appeals imports uncertainty in an area where clarity is essential. And, additionally, it forces the parties and the trial court to expend great effort in a meaningless ritual before the merits of the double jeopardy question can be adjudicated. The question of whether such a procedure should be required is an obviously important one which has not been previously addressed by the Court.

In this regard, we have carefully examined the briefs filed in this Court by both the petitioner and the Government in *Serfass* v. *United States*, No. 73-1424, O.T. 1973, and the briefs filed by the petitioner and the Government in *Abney* v. *United States*, No. 75-6521, O.T. 1976. In none of the briefs of the petitioners or the Government in those cases is the question here presented discussed. The same is true with respect to the briefs of the parties, and of the United States, as *amicus curiae*, on argument and reargument, in *Crist* v. *Bretz*, No. 76-1200, O.T. 1976. The reason is simply that none of those cases presented facts raising the question which is presented by the facts here, and by the dismissal below.

This case, thus, involves substantial and important questions involving the Double Jeopardy Clause, 28 U.S.C. §1291, Rule 12 of the Federal Rules of Criminal Procedure, and Rule 4(b) of the Federal Rules of Appellate Procedure, which have not previously been addressed by this Court, and which should not go without plenary review.

2. The double jeopardy question presented in this case, to-wit, whether an indictment for alleged conspiracy to violate the Sherman Act naming as defendants both a family-owned partnership and one of the family members, individually, offends the Double Jeopardy Clause, is, obviously, an important one. However, since the question was not addressed on the merits by the Court of Appeals, this Court may wish to remand the case for consideration of this question by the Court of Appeals before resolving it.

The issue has never been addressed by this Court. The only Court of Appeals which has considered the issue divided 2-1 as to whether the Double Jeopardy Clause proscribed such an indictment. *Western Laundry & Linen Rental Co.* v. *United States*, 424 F.2d 441 (9th Cir. 1970) *cert. denied*, 400 U.S. 849; *compare, Id.* at 445 (Hufstedler, J., concurring specially in the result).[4] The two judges who comprised the majority in *Western Laundry* believed this Court's decision in *United States* v. *A & P Trucking Company*, 358 U.S. 121 (1958) required a holding that such an indictment did not violate the Double Jeopardy Clause. See, 424 F.2d 441, 444. This is plainly incorrect. No constitutional question of any kind was presented in *A & P*, and the *A & P* Court specifically noted that, "[h]ere the Government does *not* seek to hold the individual partners, but only the partnerships as entities." *United States* v.

[4] Judge Hufstedler dissented on the double jeopardy question. Her concurrence was based on the belief that the individual defendant in the case had waived his right to a determination of the double jeopardy issue by pleading *nolo contendre*. As the Ninth Circuit has recognized, this Court's subsequent decision in *Menna* v. *New York*, 423 U.S. 61 (1975), is inconsistent with that view, and the statements in Judge Hufstedler's concurrence regarding waiver have been disapproved. *Launius* v. *United States*, 575 F.2d 770, 771, n.2 (9th Cir., 1978).

A & P Trucking Company, supra, 358 U.S. at 126, n.6 (emphasis added).

The sole question in *A & P* was whether a trucking partnership could be held to answer, alone, for a violation of a regulatory misdemeanor provision of the Motor Carrier Act. A felony indictment of both partnership and partner under the Sherman Act presents very different issues from the narrow question presented in *A & P*. *Cf., United States* v. *Dotterweich*, 320 U.S. 277 (1943), a case relied upon in *A & P*. The Court has recently taken pains to emphasize that the *Dotterweich* line of regulatory misdemeanor cases is inapplicable to a felony prosecution under the Sherman Act. *United States* v. *United States Gypsum Company*, ... U.S. ....., ..., 98 S.Ct. 2864, 2872-2876 and n.18 (1978). Moreover, the Government itself has successfully argued that the rationale of *A & P* is limited to the "purposes of the law involved in that case." *Rosenzweig* v. *United States*, 299 F.2d 22, 27 (Em.App. 1962) (Maris, J.), *cert. denied*, 369 U.S. 818, a decision which simply cannot be reconciled with the reasoning of the *Western Laundry* majority.

The question presented is of obvious importance to both petitioner and the Government. As the Government itself noted in its brief in the Court of Appeals "there are approximately 1,062,000 partnerships in the United States having gross annual receipts of $139,000,000,000." (Brief for the United States, *United States* v. *Naifeh and Abraham*, No. 79-1017 and 79-1018, Tenth Circuit, p. 8.) Since the Double Jeopardy Clause has as one of its most important functions insuring that prosecutors do not impose greater punishment for an offense than that intended by Congress,

see, Sanabria v. *United States*, 437 U.S. 54, 69-70 (1978) *and Jeffers* v. *United States*, 432 U.S. 137 (1977) (plurality opinion) (double punishment), the question of whether the Government may indict both a family-owned partnership and one of its individual partners for the same offense is plainly one going to the core of Double Jeopardy Clause concerns. The question is particularly important in the context of a family partnership such as Central. Central's only partners are Mr. Naifeh and his brother. Its only other partners since its inception were Mr. Naifeh's mother and father.

The Court has recognized that such small family-unit proprietorships may well be different from any others for purposes of constitutional analysis, *Bellis* v. *United States*, 417 U.S. 85, 101 (1974), citing, *United States* v. *Slutsky*, 322 F.Supp. 1105 (S.D.N.Y., 1972) (two-brother partnership); *see generally, United States* v. *White*, 322 U.S. 964, 701 (1944). The question should either be remanded to the Court of Appeals for an initial determination or decided on the present petition by this Court.

3. If the Double Jeopardy Clause does forbid the instant indictment, the Government's conduct in seeking a severance of the partnership defendants from the individual partners, and attempting to bring the partnerships to immediate, *separate* trial — while the double jeopardy question was pending in the Court of Appeals — should be held to constitute an election by the Government which requires it to try the partnerships only. The Government's election was made by a responsible official, the Chief of the Regional Office of the Antitrust Division, and was formally communicated to the Chief Judge for the Western District

of Oklahoma by letter (App. B, pp.1-2). The Government must have been aware, at the time it wrote the letter to the Chief Judge for the Western District of Oklahoma seeking the severance, that a favorable ruling thereon would bar trial of the individual partners in the event the partner's appeal on double jeopardy grounds was successful. There is no sound reason why the Government should not be bound by its election, as the defendants would be if the motion for severance had come from the defense. *See, Jeffers* v. *United States,* 432 U.S. 137, 97 S.Ct. 2207, 2217 (1977).

We note in closing that issues such as these simply reemphasize the need for clarity in an area where the decision below had injected confusion.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JAMES P. LINN, *Esq.*
and
B. J. ROTHBAUM, JR., *Esq.*
LINN, HELMS, KIRK & BURKETT
Suite 410, Fidelity Plaza
Oklahoma City, Oklahoma 73102
Attorneys for Petitioner
ROBERT Z. NAIFEH

July, 1979

CERTIFICATE OF SERVICE

This is to certify that the undersigned has mailed three (3) copies of the foregoing Petition for a Writ of Certiorari in conformity with Rule 33 of the Supreme Court Rules to:

Hon. Wade H. McCree, Solicitor General
Office of the Solicitor General
U. S. Department of Justice
Washington, D. C. 20530

this ..... day of ....., 1979, with postage fully prepaid thereon.

.....

APPENDIX A

NOT FOR ROUTINE PUBLICATION

FILED
United States Court of Appeals
Tenth Circuit
MAY 15 1979
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 79-1017, 79-1018

UNITED STATES OF AMERICA, Appellee, v LOUIS ABRAHAM, JR. and ROBERT Z. NAIFEH, Appellants.	Appeal From The United States District Court For The Western District of Oklahoma (D.C. # CR-78-00215-E)

Tom L. Armstrong, of Dyer, Powers, Marsh, Turner & Armstrong, Tulsa, Oklahoma, for Appellant, Louis Abraham, Jr.

B. J. Rothbaum, Jr., Oklahoma City, Oklahoma (James P. Linn, Oklahoma City, Oklahoma, and Linn, Helms, Kirk & Burkett, Oklahoma City, Oklahoma, of Counsel, with him on the Brief), for Appellant, Robert D. Naifeh.

Peter L. de la Cruz, Attorney, Department of Justice, Washington, D.C. (John H. Shenefield, Assistant Attorney General, Barry Grossman, Attorney, Department of Justice, Washington, D.C., and Barry F. McNeil and J. Michael

Weston, Attorneys, Department of Justice, Dallas, Texas, with him on the Brief), for Appellee.

Before SETH, Chief Judge, MARKEY* and HOLLOWAY, Circuit Judge.

---

*Honorable Howard T. Markey, Chief Judge, United States Court of Customs and Patent Appeals, sitting by designation.

PER CURIAM.

These appeals present double jeopardy questions which are not ripe for review. On December 7, 1978, the grand jury empaneled within the Western District of Oklahoma handed down a one-count indictment which charged the appellants and their respective partnerships with criminal violations of section 1 of the Sherman Act, 15 U.S.C. § 1.

The individuals, who are the appellants here, filed motions to dismiss the indictment on double jeopardy grounds. In these motions to dismiss and on appeal, appellants argue that if both the partner and his partnership were convicted, the partner would be subject to double punishment in that the partner would have to pay his personal fine as well as all or a share of the fine assessed against his partnership. The district court denied appellants' motions to dismiss, and they bring these appeals.

The Government contends that the district court's order overruling a motion to dismiss on double jeopardy grounds was proper as the defendant has not been put on trial for the first time. It seems apparent that to support a double jeopardy challenge, jeopardy must have attached at some stage of the proceedings. Illinois v. Somerville, 410 U.S. 458; United States v. Rich, 589 F.2d 1025 (10th Cir.); *see* Collins v. Loisel, 262 U.S. 426, 429. The Supreme Court in Serfass v. United States, 420 U.S. 377, stated:

> "The Court has consistently adhered to the view that jeopardy does not attach, *and the constitutional prohibition can have no application*, until a defendant is 'put to trial before the trier of the facts, whether the trier be a jury or a judge.' " 420 U.S. at 388 (emphasis added).

Since the defendant must first be put in jeopardy before a claim can be made that the double jeopardy clause is violated, these appellants, who have yet to be put in jeopardy for the first time, cannot advance a double jeopardy challenge.

The appellants rely on certain language in Abney v. United States, 431 U.S. 651, as support for their contention that this court must decide these double jeopardy questions. They correctly point out the issue addressed by the Supreme Court:

> "We granted certiorari to determine whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. § 1291, and thus immediately appealable." 431 U.S. at 653.

They argue that since the Supreme Court did not recite that the defendant must first be put in jeopardy for such an appeal, the contention that jeopardy must attach before double jeopardy may be challenged on appeal is incorrect.

It is apparent that the Court in *Abney* was confronted by a case where the defendant had already been put on trial and was appealing prior to a subsequent prosecution for the same indictment. The Court in *Abney* expressly held that the threat of a *subsequent* trial was so severe that a defendant may appeal a double jeopardy challenge prior to that second trial. 431 U.S. at 660-62. *See* National Broadcasting Co. v. Niemi, 434 U.S. 1354, 1355.

We affirm the district court's overruling of the appellants' motions to dismiss the indictment.

MAY TERM — JUNE 15, 1979

Before The Honorable Oliver Seth, Chief Judge, The Honorable Howard T. Markey, Chief Judge, U.S. Court of Customs and Patent Appeals*, and The Honorable William J. Holloway, Jr., Circuit Judge.

*Sitting by Designation.

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
vs.	)	No. 79-1017
	)	79-1018
LOUIS ABRAHAM, JR., and ROBERT Z. NAIFEH, Defendant-Appellants.	)	

This matter comes on for consideration of appellants' petition for rehearing in the captioned cases, or in the alternative, for clarification of the judgment, and for stay of mandate pending certiorari.

Upon consideration whereof, the Court orders:

1. The judgments of this Court in the captioned cases are amended to state "The appeal is dismissed."

2. The petition for rehearing is otherwise denied.

3. The mandates in these cases are stayed to and including July 15, 1979 pending timely filing of petitions for writ of certiorari. If on or before that date there is filed with the Clerk of the Court of Appeals, a notice from the Clerk of the Supreme Court of the United States that appellant has timely filed a petition for writ of certiorari in the Supreme Court, the stay shall continue until final disposition by the Supreme Court.

HOWARD K. PHILLIPS, Clerk

s] *Robert L. Hoecker*

By:
Robert L. Hoecker
Chief Deputy Clerk

FILED
JAN 17 1979
HERBERT T. HOPE
CLERK, U. S. DISTRICT COURT
By *Debora R. Kirby*
DEPUTY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, Plaintiff,	)	
	)	
v.	)	
	)	No. CR-78-00215E
CENTRAL LIQUOR COMPANY; JARBOE SALES COMPANY; LOUIS ABRAHAM, JR.; and ROBERT Z. NAIFEH, Defendants.	)	

ORDER OVERRULING MOTION TO DISMISS INDICTMENT ON FIFTH AMENDMENT GROUNDS

The individual Defendants herein, Robert Z. Naifeh and Louis Abraham, Jr., have each filed a Motion to Dismiss the instant indictment as to each of them as individuals. The asserted ground for said Motion to Dismiss is that the indictment of both a partner in a partnership, and the partnership, for the same offense places the partner in double jeopardy and in jeopardy of double punishment in violation of the Fifth Amendment to the Constitution of the United States.

The Government has filed a responsive brief in opposition to each of the Motions to Dismiss of the individual Defendants.

The Court has heard oral argument upon the Defendants' Motions and the Government's response thereto.

Based upon the Court's understanding of the holding of *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 79 S.Ct. 203, 3 L.Ed. 2d 165 (1968), as interpreted by the prevailing opinion of the Court of Appeals in *Western Laundry and Linen Rental Co.* v. *United States*, 424 F.2d 441 (9th Cir. 1970), cert. denied, 400 U.S. 849, the Court holds that the Motions to Dismiss on double jeopardy grounds filed by the Defendants Naifeh and Abraham must be overruled. While it appears that Defendants' arguments in favor of dismissal are supported by the specially concurring opinion of Judge Hufstedler in the *Western Laundry and Linen Rental Co.* case, the Court feels bound to follow the interpretation contained in the majority opinion of Judge Madden in said case.

The Court recognizes that under the decision of the Supreme Court in *Abney* v. *United States*, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed. 2d 651 (1977) and the Court of Appeals for the Tenth Circuit in *United States* v. *Martinez*, 562 F.2d 633 (10th Cir. 1977), this Order is a final decision within the meaning of 28 U.S.C. §1291 and therefore, appealable to the Court of Appeals for the Tenth Circuit.

s/ Luther B. Eubanks

LUTHER B. EUBANKS
UNITED STATES DISTRICT JUDGE

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
ANTITRUST DIVISION
Dallas Office
1100 Commerce Street Room 8C6
Dallas, Texas 75242

February 15, 1979

Honorable Frederick A. Daugherty
Chief Judge, Western District of Oklahoma
Room 3321, U.S. Courthouse
200 N.W. Fourth St.
Oklahoma City, Oklahoma 73102

Re: United States v. Central Liquor Co.,
Jarboe Sales Co.; Louis Abraham, Jr.;
Robert Z. Naifeh; CR: 78-00215-E

Dear Judge Daugherty:

On December 7, 1978, a grand jury investigation in this district, conducted by attorneys for the Dallas Office of the Antitrust Division, Department of Justice, returned a one count indictment under Sherman §1 (15 U.S.C. 1) against the four above named defendants.

On January 4, 1979, a motion to dismiss, on grounds of double jeopardy, was one among several motions heard and decided by Judge Luther B. Eubanks. Following his denial of that motion, and all other motions to dismiss, defendants Robert Z. Naifeh and Louis Abraham, Jr. filed notices to appeal their double jeopardy claims. That is now before the Tenth Circuit and is in the latter stages of briefing. Estimates for the length of time the matter will remain in the appellate system range from eight to twelve months, and conceivably more.

The government would strongly prefer to go to trial now against the two remaining defendants — both partner-

Supreme Court, U. S.
FILED
SEP 7 1979
MICHAEL RODAK, JR., CLERK

Nos. 79-52 and 79-53

In the Supreme Court of the United States

OCTOBER TERM, 1978

ROBERT Z. NAIFEH, PETITIONER

v.

UNITED STATES OF AMERICA

LOUIS ABRAHAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

BARRY GROSSMAN
PETER L. DE LA CRUZ
Attorneys
Department of Justice
Washington, D.C. 20530

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 79-52

ROBERT Z. NAIFEH, PETITIONER

v.

UNITED STATES OF AMERICA

No. 79-53

LOUIS ABRAHAM, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3)[1] is unreported. The opinion of the district court (Pet. App. A5-A6) is unreported.

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[1]"Pet. App." refers to the appendix to the petition in No. 79-52.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1979. The judgment of the court of appeals was amended and a petition for rehearing was denied on June 15, 1979 (Pet. App. A4). The petitions for a writ of certiorari were filed on July 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order denying a motion to dismiss an indictment on double jeopardy grounds is final and appealable where petitioners have never been subject to former jeopardy.

2. If the order is appealable, whether petitioners' claims are ripe for review.

STATEMENT

On December 7, 1978, a grand jury in the Western District of Oklahoma returned a one-count indictment charging the defendants with price-fixing, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1 (Pet. App. A2). The indictment named as defendants Central Liquor Company, Jarboe Sales Company, petitioner Naifeh, and petitioner Abraham. Petitioners Naifeh and Abraham are partners in Central Liquor and Jarboe Sales, respectively. All defendants pleaded not guilty.

Petitioners moved to dismiss the indictment against them as individuals, alleging that their prosecution would violate the Double Jeopardy Clause of the Fifth Amendment (Pet. App. A5). They contended that the indictment of a partnership and one of the partners therein places the partner in "jeopardy" of double punishment, because the criminal proceedings may result in the imposition of fines on both the partnership and the individual partner (Pet. App. A2). The district court denied the motions to dismiss (Pet. App. A5-A6), and petitioners sought immediate review.

The court of appeals dismissed the appeals (Pet. App. A4).[2] It observed that petitioners "have yet to be put in jeopardy for the first time," and concluded that the right to immediate appeal of double jeopardy claims arises only when a defendant has been subject to one prosecution and his motion to dismiss a subsequent prosecution is denied (Pet. App. A3).

ARGUMENT

We note at the outset that it is not entirely clear whether the court of appeals held that the district court's denial of the motion to dismiss was not an appealable order, or whether it assumed that the order was appealable and held that petitioners' claim on the merits was not ripe for review. The court of appeals' opinion suggests that it followed the latter path. It begins, "[t]hese appeals present double jeopardy questions which are not ripe for reivew" (Pet. App. A2). After discussing the various contentions, the opinion states, "[s]ince the defendant must first be put in jeopardy before a claim can be made that the double jeopardy clause is violated, these [petitioners], who have yet to be put in jeopardy for the first time, cannot advance a double jeopardy challenge" (Pet. App. A3). And after distinguishing *Abney* v. *United States*, 431 U.S. 651 (1977), the court originally concluded, "[w]e affirm the district court's overruling of the [petitioners'] motion to dismiss the indictment" (Pet. App. A3).

---

[2]The court of appeals initially affirmed the district court's order (Pet. App. A3), but the judgment was amended to state that the appeals were dismissed (Pet. App. A4).

However, in response to petitioners' motions for rehearing, the court of appeals amended the judgment to state, "[t]he appeal is dismissed" (Pet. App. A4), thus implying that the appeal itself was improper, presumably because the district court's order was not appealable.

Petitioners have assumed that the court of appeals' dismissed their appeals as not "final" under 28 U.S.C. 1291, and contend that it erred in doing so (Naifeh Pet. 8-14; Abraham Pet. 6-12). Petitioners suggest that this Court grant certiorari, vacate the judgment of the court of appeals, and remand the cases to that court for consideration of the merits of their double jeopardy claim (Naifeh Pet. 15; Abraham Pet. 12).

Assuming for present purposes that the court of appeals dismissed petitioners' appeal on these grounds, we believe that it was correct in doing so. Moreover, the court's conclusion that petitioners' claim under the Double Jeopardy Clause was not ripe for review is correct.

1. The court of appeals had jurisdiction only if the district court's order denying petitioner's motions to dismiss the indictment was a "final decision[] of the district court[]" under 28 U.S.C. 1291.[3] The district court believed its order was final under that section, relying on *Abney* v. *United States*, *supra*, and *United States* v. *Martinez*, 562 F. 2d 633 (10th Cir. 1977) (Pet. App. A6). That belief was erroneous.

[3]Petitioners did not seek certification of the district court's order under 28 U.S.C. 1292(b) and the district court did not certify its ruling under that section.

Abney held that a denial of a defendant's motion to dismiss the indictment on the ground of former jeopardy was a "final decision" appealable under Section 1291. But the primary reason for that conclusion was that the Double Jeopardy Clause "assures an individual that, among other things, he will not be forced * * * to endure the personal strain, public embarrassment, and expense of a criminal trial more than once for the same offense." *Abney* v. *United States*, *supra*, 431 U.S. at 661. "Obviously," said this Court, "these aspects of the guarantee's protection would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he has still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit." *Id.* at 662 (footnote omitted). It followed that a defendant's double jeopardy challenge to a second prosecution "must be reviewable before that subsequent exposure occurs." *Ibid.*

But the Court also noted that the Double Jeopardy Clause's protection "against being *twice convicted* for the same crime * * * can be fully vindicated on an appeal following final judgment * * *" (*Abney* v. *United States*, *supra*, 431 U.S. at 660; emphasis added), and thus the "special considerations * * * which justify a departure from the normal rule of finality * * * do not extend beyond the claim of former jeopardy * * *." *Id.* at 663. Here, petitioners' claim is not one of former jeopardy. They have yet to be tried even once. Rather, their claim under the Double Jeopardy Clause implicates the quite distinct protection against multiple punishment. See *North Carolina* v. *Pearce*, 395 U.S. 711, 717 (1969). Their contention is essentially that, if they are tried together

with their respective partnerships, and if both the individual and the partnership are convicted,[4] and if the trial court imposes a separate punishment on each, then the individual will have been twice punished—once in his individual capacity and once as a member of the partnership.

Regardless of the merits of such a theory (see note 7, *infra*), there is no reason to extend the rule of *Abney* to such claims. If petitioners and their partnerships are convicted, and if they are punished separately, they will be entitled to full appellate review of their double jeopardy claim and any other claim they might wish to raise. Unlike *Abney*, where review following trial would be an empty remedy because the second trial itself is the evil the Double Jeopardy Clause was meant to preclude, appellate review of petitioners' convictions can adequately protect them against double punishment, if such protection is due them, because the court of appeals—or this Court—can eliminate that portion of the punishment that violates the Double Jeopardy Clause. See *Jeffers* v. *United States*, 432 U.S. 137, 157-158 (1977) (plurality opinion), 160 (concurring opinion). Thus petitioners do not come within the "former jeopardy" rule announced in *Abney*, and there is no reason to extend *Abney*'s limited holding to them.[5]

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[4]A partnership may be indicted and convicted for a violation of the Sherman Act. *Western Laundry and Linen Rental Co.* v. *United States*, 424 F. 2d 441, 443 (9th Cir.), cert. denied, 400 U.S. 849 (1970). But "* * * the conviction of a partnership cannot be used to punish the individual partners, who might be completely free of personal guilt." *United States* v. *A & P Trucking Co.*, 358 U.S. 121, 127 (1958).

[5]There is thus no substance to petitioners' claim (Naifeh Pet. 13-14; Abraham Pet. 8) that the court of appeals' ruling introduces a "fact-specific focus on each particular appeal" (Naifeh Pet. 13) to determine whether it is allowable under 28 U.S.C. 1291 and *Abney*. Courts will be quite able to determine whether a motion to dismiss an indictment under the Double Jeopardy Clause is based on a claim of successive prosecutions or of multiple punishments. If this is a "fact-specific" inquiry, it is not a difficult or uncertain one.

United States v. *Martinez*, *supra*, on which the district court also relied in stating that its order was final and appealable, provides no further support. The defendants in *Martinez* moved to dismiss an indictment on grounds of former jeopardy, *i.e.*, that they had previously been acquitted of the same offense, and thus the Double Jeopardy Clause barred the second prosecution. The Tenth Circuit, correctly relying on *Abney*, held that the district court's denial of defendants' motion was final and appealable under Section 1291. *United States* v. *Martinez*, *supra*, 562 F. 2d at 634 n.1.

Petitioners contend (Naifeh Pet. 13; Abraham Pet. 8) that the trial itself is what they are seeking to prevent. But there is nothing in the Double Jeopardy Clause that aids a defendant facing trial for the first time.[6] See *North Carolina* v. *Pearce*, *supra*, 395 U.S. at 717. Thus petitioners have no right under the Double Jeopardy Clause to avoid trial simply because the partnerships of which they are members are also on trial. Whether they have a right to avoid or reduce their punishment following conviction if the partnerships are also punished is a question that can be reviewed and decided if and when it arises, with no infringement of petitioners' right under the Double Jeopardy Clause to be free of multiple punishments for the same offense.

---

[6]*Launius* v. *United States*, 575 F. 2d 770 (9th Cir. 1978), on which petitioners rely (Naifeh Pet. 9; Abraham Pet. 10), is not in point. In that case, the defendants pleaded guilty to an information that charged two counts—a conspiracy to smuggle heroin and a conpiracy to smuggle amphetamines. They were sentenced consecutively on the two counts. But there was only one conspiracy, and hence only one offense. 575 F. 2d at 771. On a motion challenging their sentences under 28 U.S.C. 2255, the district court denied relief, reasoning that there was a distinction, for double jeopardy purposes, between "sequential double punishment"—that is, punishment imposed in a second trial after punishment imposed in a first—and "double

2. The court of appeals thus was correct in holding that petitioners' double jeopardy claims are not ripe for review. For the reasons we have discussed, petitioners' only colorable claim under the Double Jeopardy Clause—the right to be free from multiple punishments for the same offense—can be fully reviewed if and when petitioners and their respective partnerships are both convicted and separately punished. Review at that time will not prejudice any right under the Double Jeopardy Clause because the punishment can be modified, if appropriate, before it is exacted.[7]

---

punishment imposed simultaneously"—that is, two punishments imposed at one trial. 575 F. 2d at 771; see *Menna* v. *New York*, 423 U.S. 61 (1975). The Ninth Circuit, reversing the district court, found "no basis for such a distinction." 575 F. 2d at 771.

That decision is of no help to petitioners. It certainly does not stand for the proposition that there is no distinction between the Double Jeopardy Clause's protection against successive prosecutions and its protection against multiple punishments, or that decisions such as *Abney* that construe the former can be uncritically applied to the latter.

[7]Nothing we say in this brief in opposition should be taken as implying that petitioners' claims have merit, even when properly raised. See *Western Laundry and Linen Rental Co.* v. *United States*, *supra*, 424 F. 2d at 443-445.

Judge Hufstedler, specially concurring in *Western Laundry*, stated that the defendant's double jeopardy claim in that case—which is similar to petitioners' claim here—was waived because the defendant pleaded guilty to the indictment and did not raise his multiple-punishment claim until after separate punishments had actually been imposed on the defendant and his partnership. But this Court subsequently held in *Menna* v. *New York*, 423 U.S. 61 (1975), that a guilty plea is not a waiver to a claim of former jeopardy. See *id.* at 62 n.2. And see *Launius* v. *United States*, *supra*. Thus, even if petitioners were to withdraw their not guilty pleas and plead guilty, they arguably would not have waived their claim that the Double Jeopardy Clause precludes separate punishment of a partner and his partnership.

3. Petitioners appear to read the court of appeals' decision as holding that their double jeopardy claims will become ripe for review when jeopardy attaches in their upcoming trial. From this reading, they contend (Naifeh Pet. 10-14; Abraham Pet. 11-12) that the court of appeals' decision will encourage disruptions of trials because defendants in petitioners' shoes must present their double jeopardy motions to the district court and appeal any adverse rulings only after a jury has been sworn.

The court of appeals' decision cannot reasonably be read to encourage such results. It is true that the court quoted from *Serfass* v. *United States*, 420 U.S. 377, 388 (1975) that "jeopardy does not attach, *and the constitutional prohibition can have no application*, until a defendant is 'put to trial before the trier of the facts * * *' " (Pet. App. A3; emphasis by court of appeals). But the question in *Serfass* was whether the government could appeal dismissal of an indictment prior to trial. This Court held that 18 U.S.C. 3731 allowed the government to appeal whenever further prosecution would not be prohibited by the Double Jeopardy Clause (420 U.S. at 387), and that jeopardy had not attached in that case because the jury had not yet been sworn (*id.* at 389). Perhaps the court of appeals could have found a more apt case in support of its conclusion that petitioners' claims were premature, *e.g.*, *Jeffers* v. *United States*, *supra*. But nothing in the court of appeals' opinion implies that petitioners will have a ripe claim, and a right of appeal, if they renew their motions after the jury is sworn and jeopardy attaches in their trial. As noted, their claim will be ripe for adjudication only after the trial court imposes separate sentences on them and their partnerships, if that is in fact what happens.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

JOHN H. SHENEFIELD
Assistant Attorney General

BARRY GROSSMAN
PETER L. DE LA CRUZ
Attorneys

SEPTEMBER 1979

Supreme Court, U. S.
FILED
SEP 19 1979

In the Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-52 and 79-53

ROBERT Z. NAIFEH,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

LOUIS ABRAHAM, JR.,
Petitioner,
VERSUS
UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY MEMORANDUM OF PETITIONERS, ROBERT Z. NAIFEH AND LOUIS ABRAHAM, JR.

JAMES P. LINN
B. J. ROTHBAUM, JR.
of
LINN, HELMS, KIRK & BURKETT
Suite 410, Fidelity Plaza
Oklahoma City, Oklahoma 73102

and

TOM L. ARMSTRONG
of
DYER, POWERS, MARSH, TURNER & ARMSTRONG
Suite 210, Pepsico Building
525 S. Main
Tulsa, Oklahoma 74103

Attorneys for Petitioners, Robert Z. Naifeh and Louis Abraham, Jr.

September, 1979

UTTERBACK TYPESETTING CO. — PHONE 235-0030 — 3740 S. HOLLIDAY AVE. — OKLA. CITY, OKLA. 73115

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In the
Supreme Court of the United States
OCTOBER TERM, 1979

Nos. 79-52 and 79-53

ROBERT Z. NAIFEH,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

LOUIS ABRAHAM, JR.,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY MEMORANDUM OF PETITIONERS, ROBERT Z. NAIFEH AND LOUIS ABRAHAM, JR.

The Response of the United States to these petitions for writs of certiorari, although styled a "Brief in Opposition", is, in truth, a statement of reasons why certiorari clearly should be granted to review the bafflingly opaque decision of the Court of Appeals in this case.

1. The United States, in its very gingerly-worded Response, admits that the Court of Appeals "is not entirely

clear" (Brief, p. 3) on the question of whether the Court of Appeals dismissed the instant appeal for want of an appealable order within the meaning of 28 U.S.C. § 1291 or whether the Court of Appeals dismissed the appeal on the ground that petitioners' Double Jeopardy Clause claims were not ripe for appellate review .

We fully agree with the Government that the holding of the Court of Appeals is not only unclear but hopelessly ambiguous on this crucial point. The point is crucial because of the "mandatory and jurisdictional" requirement of Rule 4(b) of the Federal Rules of Appellate Procedure that, in a criminal case, a Notice of Appeal must be filed within ten days of the date of the entry of the judgment or order appealed from or be forever time barred. *United States* v. *Robinson*, 361 U.S. 220, 224, 229 (1960). Indeed, only last Term, this Court, at the Government's urging, has driven this point home with unmistakable clarity. *Helstoski* v. *Meanor*, ... U.S. ....., 99 S.Ct. 2445, 2448 n.4 (1979).

We invite the Court's particular attention to the fact that the United States makes no attempt whatsoever to defend the decision of the Court of Appeals as it is written. The Government, in its very tentatively-worded brief, suggests that the Court of Appeals' opinion did not really *mean* what it plainly appears to *say*, although the United States is unable to avoid agreeing that ". . . it is true that the Court [of Appeals] . . ." quoted from language contained in *Serfass* v. *United States*, 420 U.S. 377, 388 (1975) which clearly demonstrates the Court of Appeals *did mean exactly what it said; said exactly what it meant;* that its holding is the law of the Tenth Circuit; and, we submit, that its

holding clearly should be reviewed by this Court. The Court of Appeals appears to agree. As noted in our petitions, the Court of Appeals took a step virtually unprecedented in Tenth Circuit practice in staying its mandate herein, pending disposition of these petitions for certiorari even though the stay halted any trial on a pending indictment in the District Court. Clearly, we submit, the Court of Appeals would not have taken this extraordinary action if it did not believe the question here presented should be reviewed by this Court.

The Government suggests that another decision could have been written by the Court of Appeals which would have reached a more "reasonable" result, and which would not require "disruptions of trials" with a jury already sworn in order to present double jeopardy claims of the type here at issue (Brief, p. 9). Perhaps so.

But neither counsel for petitioners nor counsel for the Government have the power to instruct a Court of Appeals as to how it is to write its decisions, or what the precedential force of a decision of a Court of Appeals is upon District Courts within the Circuit over which it exercises appellate jurisdiction, and over counsel who must practice within those District Courts. Rather, review of an important appellate decision so clearly unreasonable that even the Government, when it is the prevailing party, is hesitant to defend the decision as it reads, is one of the reasons why this Court sits. And it is the principal reason why writs of certiorari should obviously be granted in this case.

We also invite the Court's particular attention to the fact that *each* point which the Solicitor General suggests

the Court of Appeals, despite its language, did not really mean to reach and decide as it did, is a point which petitioners *expressly* and forcefully presented to the Court of Appeals by way of an elaborate Petition for Rehearing or Clarification.

2. The response of the Court of Appeals to our Petition for Rehearing (or clarification) was to deny the Petition for Rehearing, to "clarify" the judgment to the extent of stating that the appeals were "dismissed" rather than "affirmed", as the judgments had originally read, and to then take the highly unusual step of staying its mandate in these cases pending disposition of petitions for writs of certiorari. As noted, the Court of Appeals stayed its mandate in these cases even though the stay has the effect of preventing trial upon a pending indictment in the District Court. Insofar as we are aware, or insofar as inquiry at the office of the Clerk of the Court of Appeals reveals, such an order appears to be virtually unprecedented in Tenth Circuit practice under such circumstances.

In other words, the Court of Appeals must clearly be understood to have been aware that it was deciding an important and substantial Double Jeopardy Clause question, as well as an important and substantial question involving the proper interpretation of the "final decision" requirement of 28 U.S.C. § 1291, and one which it felt the prior decisions of this Court *compelled*. Otherwise, the stay of the mandate pending certiorari would have been denied. When the Petition for Rehearing (or clarification) is compared to the Court's order disposing of the same entered on June 15, 1979, it is clear that the Court of Appeals *meant* what it said; that the Court of Appeals clearly understood

the *effect* of what it was saying; and that it held as it did, even though an extensive Petition for Rehearing had made the same point the Solicitor General in effect concedes: the decision simply makes no sense.[1] Upon examination of the Government's response Brief, it becomes clear that both the Solicitor General and petitioners are in agreement on one point: no one understands the ultimate disposition which the Court of Appeals has made of the important double jeopardy questions which were presented to it by petitioners' appeals.

> The Government admits that it should be noted
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> ". . . at the outset that it is not entirely clear whether the court of appeals held the district court's denial of the motion to dismiss was not an appealable order, or whether it assumed the order was appealable and held that petitioner's claim on the merits was not ripe for review." (Brief for the United States, p. 3)

We could not agree more. Our Petition for Rehearing, or for clarification of the judgment, of the Court of Appeals made this same point almost verbatim, observing that

> "It is not clear, at least to us, whether the Court intended its disposition of these appeals to rest upon the nature of the Double Jeopardy Clause claim, or, rather, upon the 'final decision' requirement of 28 U.S.C. § 1291." (Petition for Rehearing, Clarification or Stay of Mandate, p. 5).

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[1] Because of the vital need for clarification which petitioners believed the Court of Appeals' opinion of May 15 created, petitioners sought, and received, special leave of the Court of Appeals to file a joint petition for rehearing or clarification in excess of the page limitation established by the Rules of the Court of Appeals for the Tenth Circuit.

We strongly urged that ". . . this potentially very important point be clarified by the Court." (Petition for Rehearing, p. 6).

The Court of Appeals' response was to amend its judgment to state that the appeal from the District Court's order overruling Appellants' double jeopardy claims was "dismissed" rather than "affirmed" as the opinion had originally held, but to otherwise deny either rehearing or clarification, and to then stay the mandate pending certiorari. *That* is the action of a Court which is firmly convinced *this* Court's decisions require the holding which it reached.

The Government suggests that there is "no reason to extend" the rule of immediate appealability of *Abney* v. *United States*, 431 U.S. 651 (1977), to include the double jeopardy claims presented by petitioners. The implicit assumption is that this case requires an "extension" of the *principles* of *Abney*. This is, we believe, erroneous. The Government reaches its conclusion by stating, in a tone of unexplained self-assurance, that the decision of the Court of Appeals for the Ninth Circuit in *Launius* v. *United States*, 575 F.2d 770, 771 (9th Cir. 1978) does not really mean what it said either. (Brief for the United States, p. 7, n. 4). The question of whether certiorari should be granted in these cases should not be answered on the basis of how the Government psychoanalyzes the Judges of the Courts of Appeals to determine what their opinions "really" meant. *Cf*, *United States* v. *Constantine*, 296 U.S. 287, 298-299 (1935) ("The judgment of the Court rests upon the ruling that another purpose, not professed, may be read beneath the surface, and by the purpose so imputed the

statute is destroyed. Thus, the process of the psychoanalysis has spread to unaccustomed fields." Cardozo, J., dissenting).

We are not aware of any theory of law by which counsel for either side may undertake to deny review of a decision hurtful to the opponent by informing the reviewing Court that prevailing counsel has devined that, though the Court below stated one result, it really must have intended another.

Moreover, it should be remembered that the Double Jeopardy Clause issues in this case were orally argued at length before the District Court. The District Court made unmistakably clear its belief that, under *Abney*, a decision adverse to petitioners would be immediately appealable. The Government was represented by able counsel at the hearing conducted by the District Court, including the Chief of the Regional Office of the Antitrust Division of the Department of Justice. At no time did the Government challenge or question in any way Judge Eubanks' clear statement of opinion that his ruling on the double jeopardy question would be immediately appealable.[2]

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[2] The Government's comment that petitioners herein did not seek certification of the District Court's order under 28 U.S.C. § 1292(b) (Brief for the United States, p. 4, n. 3), thus, comes with extraordinary ill grace. As noted in our petitions for certiorari, the District Court was of the opinion that petitioners' double jeopardy claims *were valid* and should be *sustained*. The District Court squarely ruled that, as an original proposition, petitioners would ". . . have *no difficulty . . . persuading me that we have double jeopardy here . . .*" (Transcript, p. 19, lines 23 through p. 20, line 1). The District Judge overruled petitioners' double jeopardy claims *solely* because, as the District Judge noted, a divided panel of the Court of Appeals for the Ninth Circuit had ruled in a manner contrary to his view in *Western Laundry & Linen Rental Co.* v. *United States*, 424 F.2d 441 (9th Cir. 1970) *cert. denied*, 400 U.S. 849, and Judge Eubanks stated, he did not believe it proper for a single District Judge to disagree with a

The Government's belated discovery that the District Court's firm holding that its order was immediately appealable was "erroneous" (Brief, p. 4) is little more than a restatement of the argument contained in the Government's brief in *Abney*, to the effect that a double jeopardy claim, if good, can always be reviewed and corrected on appeal in the event of an unfavorable verdict and becomes moot in the event of a favorable verdict. The argument did not prevail in *Abney* and should not prevail here.

3. The Government argues that the decision of the Court of Appeals "cannot reasonably be read to encourage" disruptions of trials once a jury has been sworn because, although the Court of Appeals *said* this, it did not really *mean* it. Indeed, the Government goes so far as to state that

> "Nothing in the Court of Appeals' opinion implies that petitioners will have a ripe claim, and a right of appeal, if they renew their motions after the jury is sworn and jeopardy attaches in their trial."

This is simply not true.

Petitioners herein *urged and reurged clarification of this vital issue* in their Petition for Rehearing in the Court of Appeals. We argued that the Court of Appeals should

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[2] (Continued)

panel — even a divided panel — of a Court of Appeals. It is apparent from the circumstances, that, had the Government expressed the *slightest* question as to appealability, Judge Eubanks would have seriously considered a certification order under 28 U.S.C. § 1292(b) because, in his opinion, *Western Laundry* was wrongly decided. The Government's implicit suggestion that counsel for petitioners should have sought certification under the circumstances above described is, thus, singularly inappropriate. Neither the final decision requirement of 28 U.S.C. § 1291, nor the certification provision of 28 U.S.C. 1292(b) is intended to function as a trap which the Government may spring by studied silence in the District Court.

not impose a requirement upon defense counsel or the District Courts

> ". . . that the defendant be required to follow the highly disruptive course of waiting for a jury to be formally sworn before presenting his double jeopardy claim to the District Court and, under the holding of *Abney* v. *United States*, to this Court, [that is, the Court of Appeals] in the event the District Court overrules the motion to dismiss." (Petition for Rehearing, p. 6).

Petitioners emphasized, as strongly as language will allow, that the opinion of the Court of Appeals placed counsel for petitioners in a position of

> "grave practical tension . . . between [counsels'] professional and ethical obligations to their respective clients on the one hand and their professional and ethical obligations to the trial court on the other." (Petition for Rehearing, p. 2).

Petitioners pleaded at length with the Court of Appeals to *clarify or reconsider* its opinion in order to *avoid* a situation in which

> *"counsel for Mr. Naifeh and Mr. Abraham would have a professional duty to their respective clients to immediately appeal to this Court in the event the District Court denied the motions to dismiss, thereby disrupting the trial with a jury already empaneled. Moreover, counsel for the defense would be required to do so knowing in advance that the empaneling of the jury was a mere formality which would be the trigger for renewal of the motions to dismiss on double jeopardy grounds and an appeal in the event the motions were denied."* (Petition for Rehearing, p. 15) (emphasis in original).

Counsel for petitioners argued at length that, under the opinion of the Court of Appeals, if we did *not* disrupt the proceedings in the District Court immediately upon empanelment of the jury and did *not* file a Notice of Appeal from the District Court's ruling within ten days, the Court of Appeals would have

> "no jurisdiction to hear the appeal presenting the double jeopardy issues since timely filing of a Notice of Appeal from a final decision of the District Court is 'mandatory and jurisdictional', *United States* v. *Robinson*, 361 U.S. 220, 224 (1960) and, thus, the right of Mr. Naifeh and Mr. Abraham to consideration of the constitutional questions presented here on the merits would be forever foregone . . ." (Petition for Rehearing, p. 16).

Lastly, counsel for petitioners urged the Court of Appeals,

> ". . . in the interest of the orderly administration of justice, [to] indicate to counsel and the trial court the procedure which is to be followed on remand *to protect* Mr. Naifeh's and Mr. Abraham's *right to appellate review of the question presented in light of the time limitations for appeal from a 'final decision' of the District Court.*" (Petition for Rehearing, p. 20).

We reiterate that the Court of Appeals denied petitioners' motion for rehearing or clarification of its decision, but amended its judgment and stayed its mandate pending certiorari.

In other words, the Court of Appeals must be understood to have clearly and unequivocally held, contrary to the Government's suggestion, that as the Court of Appeals reads this Court's decisions, petitioners *must* reassert their

double jeopardy claims as soon as a jury is empaneled and sworn in the District Court and, in the event the District Court overrules the motion to dismiss, *must* immediately appeal to the Court of Appeals within the 10-day jurisdictional time limit of Rule 4(b) of the Federal Rules of Appellate Procedure or never receive appellate review of the question at all. *See, Helstoski* v. *Meanor*, ... U.S. ....., 99 S.Ct. 2445, 2449 n. 4; *Id.* at 2449-2450 (Brennan, J., dissenting from denial of issuance of a writ of mandamus).

In light of the issues presented, in strong terms, in our Petition for Rehearing, clarification or stay of the mandates pending certiorari, the only rational conclusion to be drawn from the Court of Appeals' order denying rehearing but staying the mandates is that the Court of Appeals meant exactly what it said.

We are in accord with the Government's apparent agreement that such an unseemly and disruptive procedure should not be required in every District Court in the Tenth Circuit. For that very reason, certiorari should be granted, the jurisdictional dismissals entered by the Court of Appeals should be vacated and the causes should either be decided on their merits or be remanded to the Court of Appeals with instructions to decide the double jeopardy claims presented herein on the merits.

4. On the merits, the Government's blasé assumption that the Double Jeopardy Clause claims are of doubtful validity is without foundation. As noted, the District Court was clearly of the view that, as an original question, it would have *sustained* the motions on the ground the in-

dictment shows on its face it offends the Double Jeopardy Clause.

Only the District Judge's belief it would be improper for a single District Judge to so hold in view of the contrary opinion of the Ninth Circuit in *Western Laundry* prevented such an order from being entered, a fact clearly shown, we believe, by the transcript of the hearing. The District Court's belief was, we submit, correct. Indeed, the Government itself has made a closely analogous argument, and prevailed, before a distinguished panel of Circuit Judges sitting on the Court of Emergency Appeals in *Rosenzweig* v. *General Services Administration*, 299 F.2d 22, 27-29 (Em.App. 1962) *cert. denied*, 369 U.S. 818.

The Government's casual statement that one sentence of *dictum* in the opinion for a bare majority of the deeply divided Court in *United States* v. *A &P Trucking Co.*, 358 U.S. 121, 127 (1958) (Brief, p. 6, n. 4) disposes of the Double Jeopardy Clause claims here at issue, is contrary to the Government's own argument in *Rosenzweig, see*, 299 F.2d at 29, that A & P should be limited to the statute — the Motor Carrier Act — ". . . involved in that case . . ." and, moreover, the Government's assumption has been subjected to a sharp critique by Judge Hufstedler, in her separate opinion in *Western Laundry & Linen Rental Co.*, 424 F.2d at 445 (9th Cir. 1970). We submit Judge Hufstedler's, and Judge Eubanks', views are correct on the merits. There is, thus, a powerful argument that petitioners' claim that the instant indictment offends the Double Jeopardy Clause is well taken. The issue should either be decided by this Court or, alternatively, remanded to the Court of Appeals for an initial decision on the merits.

For the foregoing reasons, the petitions for writs of certiorari should be granted.

Respectfully submitted,

JAMES P. LINN
B. J. ROTHBAUM, JR.
of
LINN, HELMS, KIRK & BURKETT
Suite 410, Fidelity Plaza
Oklahoma City, Oklahoma 73102
(405) 239-6781

and

TOM L. ARMSTRONG
of
DYER, POWERS, MARSH,
TURNER & ARMSTRONG
Suite 210, Pepsico Building
525 S. Main
Tulsa, Oklahoma 74103
(918) 587-0141

Attorneys for Petitioners,
Robert Z. Naifeh and
Louis Abraham, Jr.

September, 1979

CERTIFICATE OF SERVICE

This is to certify that the undersigned has mailed three (3) copies of the foregoing Reply Memorandum of Petitioners, Robert Z. Naifeh and Louis Abraham, Jr., in conformity with Rule 33 of the Supreme Court Rules to:

Honorable Wade H. McCree, Solicitor General
Office of the Solicitor General
U. S. Department of Justice
Washington, D. C. 20530

this ..... day of ....., 1979, with postage fully prepaid thereon.

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